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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO MILWAUKEE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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The central question in this case is whether petitioners' Tucker Act remedy should be deemed to have been preempted by the reorganization court's gratuitous finding of just compensation. The reorganization court made this finding despite the fact that the compensation awarded to petitioners for their rail assets was $210 million less than the amount another purchaser was willing to pay. If that gratuitous finding is not vacated, the government will seek to bar petitioners' Tucker Act suit for recovery in the Claims Court. Although the government vigorously resists the limited relief sought by petitioners, the government completely fails in its attempt to show that the finding was necessary or appropriate to the determina-

tion which the district court was required to make. Because of the magnitude of the taking at issue in this case, the importance of the principle established by the Seventh Circuit, and the conflict created with other decisions of this and other courts, this Court should grant certiorari.

1. The government principally contends (Br. Opp. 12) that the reorganization court's finding of adequate compensation was not unnecessary because that finding cannot be "severed" from the approval of the sale. That is true, the government asserts (Br. Opp. 12), "because the MRRA [Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-922] did not authorize the court to approve the sale for consideration that was not constitutionally adequate." This contention—that the MRRA does not permit a transfer *without* adequate compensation—is the essential, indispensable premise upon which the government's position is based. It is wrong.

The MRRA does not authorize, let alone require, the reorganization court to make a determination that the compensation paid for rail lines is fair and adequate. The government attempts to read this requirement into the MRRA by means of a four-step rationalization: first, the Commission "construed" the MRRA to incorporate requirements of the Interstate Commerce Act; second, the Commission relied upon the interpretation given to the Interstate Commerce Act by the courts; third, the Commission concluded from these cases interpreting the Interstate Commerce Act that the MRRA was meant to require payment of fair market value; and, fourth, the reorganization court adopted the Commission's interpretation. (Br. Opp. 2-3.) The logic of this argument is illusory. Deference to the Commission is unwarranted because it was not engaged in generally applicable rulemaking or adjudication, but was simply construing special legislation for its own benefit. More importantly, the Com-

mission's rationale ignores the plain fact that the MRRA includes *no* provision conditioning the court's approval of a sale of rail assets upon a prior finding that compensation is just.

In the absence of any express language in the MRRA, and in the absence of any judicial precedent interpreting the MRRA, this Court must look to the overriding purpose of the statute. In the MRRA, Congress enacted special legislation which had as its express overriding purpose the preservation of uninterrupted essential rail service in the Midwest. (45 U.S.C. § 901.) Like the Regional Rail Reorganization Act, the MRRA was intended to facilitate an expedited transfer of rail property in order to ensure preservation of essential rail service. (Pet. 11.) Following this Court's decision in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), Congress explicitly incorporated a Tucker Act remedy to make it clear that there was redress for any shortfall in the adequacy of compensation.

In view of Congress' central purpose of maintaining rail service, the Commission and the reorganization court both decided in favor of a sale to the Soo rather than to the CNW, the higher bidder, despite their finding that both bidders satisfied the traditional public interest tests of the Interstate Commerce Act. The Commission and the court ruled in favor of the Soo because the Soo better fulfilled the public interest concerns which led to the enactment of the MRRA: more rail lines would remain in service with the Soo than with the CNW, and more rail jobs would be preserved. In light of these overriding congressional objectives, the reorganization court felt it had no choice but to sacrifice the best interests of the estate to the public interest, and consequently endorsed the Soo bid.

Moreover, as the court of appeals expressly recognized, the MRRA is distinguishable from the general bankruptcy statute which requires the bankruptcy court to consider the adequacy of compensation. (Pet. App. 14.) In an ordinary bankruptcy, the identity of the purchaser is a matter of complete indifference to the government; under the MRRA, the identity of the purchaser is essential. The MRRA permits a judge to award the sale of a railroad's lines to a particular purchaser (who may not be the highest bidder), whereas the general bankruptcy statute requires an auction, with the sale to the highest bidder. If Congress had intended that the reorganization court order the sale of rail lines to the highest bidder without regard to public interest considerations, it could have provided for a simple public auction as in the ordinary bankruptcy case. Congress did not do so.

When the government argues that the MRRA did not authorize the reorganization court to take property (Br. Opp. 14-15), it not only misinterprets the Act, but it also misinterprets the authorities it cites. The cases upon which the government relies are inapposite; these cases simply stand for the proposition that no taking had occurred when a government agent either exceeded the scope of its authority, *see, e.g., United States v. North American Transportation & Trading Co.*, 253 U.S. 330, 334 (1920), or committed an act specifically forbidden, *see Hooe v. United States*, 218 U.S. 322 (1910). These cases would apply here only if the government could establish that the district court exceeded its jurisdiction; but the government does not and cannot make this argument because the reorganization court was authorized by the MRRA to order the sale of the Milwaukee Road's rail assets in the public interest. The court acted within the scope of its authority in ordering the sale. The "error" in authorizing a sale at less than fair market value is not

an "error" at all, because it is specifically what Congress contemplated—a sale in which the driving principle is not full compensation to the seller, but furtherance of the public interest in continued rail service. Congress recognized that those two factors—full compensation and furtherance of the public interest—are independent variables, and that there was no assurance that both could be satisfied. Thus, in the MRRA, Congress directed the reorganization court to approve a sale of rail assets by exclusive reference to the public interest. This, most clearly, is a taking of private property for public purposes. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243-44 (1984).

The government's attempt to read into the MRRA a requirement that nowhere appears in the Act—that compensation be just before a sale of rail assets may be mandated—would eviscerate the statutory policy adopted by Congress. The fallacy of the government's argument is well demonstrated by the fact that, under the government's construction, continued rail service could not be preserved in the event that only one bid was submitted and that bid was for an amount less than the constitutional minimum. In addition, the emergency nature of the Act and the public purposes it was intended to foster are wholly incompatible with the government's interpretation. The MRRA itself authorizes a taking and incorporates the right to Tucker Act relief.

Moreover, the government's argument improperly reads out of the MRRA the Staggers Rail Act amendment to the MRRA, which states that nothing contained in the MRRA "shall limit the right of any person to commence an action in the United States Court of Claims under . . . the Tucker Act." 45 U.S.C. § 1018(c). The legislative history of that amendment totally rebuts the limited genesis and purpose for which the government argues (Br. Opp. 20-21). (Pet. 11-12.) More importantly, the legislative

history of that amendment in no way undercuts the broad sweep of its language. Thus, the question whether there was a taking here is properly a question for the Claims Court. (Pet. 12-14.) As the government itself has so recently and powerfully argued to this Court (*see* Brief for the United States, *United States v. William Hohri*, No. 86-510 at 16-17), congressional policy requires that all Tucker Act claims be centralized in the Claims Court and the Court of Appeals for the Federal Circuit.

2. The government argues (Br. Opp. 12-14) that a claim against the United States is precluded because (a) the CNW withdrew its $210 million higher bid, and (b) the Debtor and CMC did not seek a stay from the court of appeals to prevent the sale of the core rail assets to the Soo.

This argument simply misses the point. In fact, petitioners timely invoked the only procedural mechanisms which would have prevented the necessity for Tucker Act relief—a writ of mandamus and a stay in the reorganization court. Either of these avenues of relief would have forestalled entry of an order directing the sale to the Soo. Because the CNW had reserved the right to withdraw its bid once the reorganization court had entered an order authorizing a sale to its opponent (R. 44), these were the only procedures that would have preserved the status quo and avoided the necessity of Tucker Act relief.

Petitioners were confronted with the fact that the CNW withdrew its bid to avoid tying up its management energies and assets in a protracted appellate struggle. Thus, petitioners could have exercised their theoretical right to seek a stay pending appeal, but the most that such a stay could have achieved would have been to defeat the sale to the lower bidder—at a time when the higher bid already would have been withdrawn. Moreover, by reason of Bankruptcy Rule 8-703(a)(6), 11 U.S.C. App. at 1412

(1976 ed.), after the sale to the Soo had been consummated, appeal of the order authorizing sale was effectively precluded. For these reasons, the government's emphasis on the subsequent procedural history is irrelevant.

In sum, no purpose would have been served by seeking a stay of the reorganization court's sale order *after* the sale order had been entered. Not only could the CNW have validly withdrawn its $210 million higher bid at that time, but the Soo offer also might have been lost. The defeat of any sale would have prolonged the reorganization proceedings, delayed the payment of creditors, and increased the likelihood that the Milwaukee Road, like the Rock Island, would have to be liquidated and rail service abandoned. These results would have been antithetical to the purposes of the MRRA. To assert that petitioners are now precluded from seeking relief under the Tucker Act because they declined to seek a stay—which would have benefitted no one—is to exalt form over substance and to ignore the very purpose for which the MRRA was enacted.

Finally, the government cannot now be heard to complain that the Trustee chose to mitigate his damages by proceeding to close on the Soo sale rather than run the additional risk of unravelling that deal as well, and possibly jeopardizing all chance of continued rail service. If the Trustee had decided not to proceed with the Soo sale in the hope of resurrecting the CNW bid, the government undoubtedly would now be asserting that the Trustee had failed to mitigate his damages. In any event, whether the Trustee properly mitigated his damages by proceeding to close on the Soo sale is an issue that should be resolved by the Claims Court in a Tucker Act proceeding.

3. The government advances the alternative argument (Br. Opp. 21-24) that the determination of adequacy of

compensation was not an "error". The government asserts that because petitioners invested their capital in a railroad, public interest obligations were attendant to the investment, and could be expected to lower their return. (Br. Opp. 21.) This argument, which could be used to justify virtually every inequitable treatment of any public utility, was properly and explicitly rejected by the court of appeals. (Pet. App. 15.) As the court of appeals noted (Pet. App. 15-16), the Commission approved the CNW bid as consistent with the public interest under the traditional standards of the Interstate Commerce Act. Absent the special provisions of the MRRA, this was all that the public interest required. Moreover, each of the bids had already taken into account the cost of federal and state regulation of railroads. Otherwise, as the court of appeals recognized, the bids might have been even higher. (Pet. App. 15-16.)

The government's defense of the Commission's methodology in determining the adequacy of consideration offered by the Soo (Br. Opp. 21) also is unfounded. While reliance on hypothetical formulas and ratios might have provided the best evidence of fair market value prior to the receipt of the CNW's higher bid, such reliance could not withstand scrutiny after that bid was made. The CNW offer was a serious and legitimate offer which, but for the MRRA's heightened public interest requirements, would have been accepted. Once the CNW made its offer, there was a price established by a willing buyer and a willing seller, which the courts repeatedly have held to be the best evidence of fair market value. (Pet. App. 13.)

As the government correctly notes (Br. Opp. 21 n.10), the court of appeals did not expressly decide the question whether the CNW's bid established the constitutional minimum of just compensation for these lines. Nonetheless, even a cursory review of the court of appeals' opin-

ion leaves little doubt as to its position on this issue. The court of appeals stated that "actual bids usually *establish* the 'fair market value' of the property." (Pet. App. 7, emphasis in original.) The court of appeals also observed that the Commission's first decision relied on the absence of a bid higher than the Soo's to prove that CMC's valuation methodology was unrealistic, but that, ultimately, the CNW's bid matched the amount at which CMC had valued the property. (*Id.*) Finally, the court of appeals cited numerous cases which establish that (Pet. App. 13):

> the district judge erred in believing that $570 million would have been 'just compensation', had the United States condemned the Milwaukee's rail properties. See *United States v. 50 Acres of Land*, [469 U.S. 24] (1984) (the price that a willing buyer would pay a willing seller is the constitutional measure of just compensation); *Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665 (7th Cir. 1982) (the fair market value of a line of railroad is the line's scrap value when there is no higher bid); *In re Valuation Proceeding*, 445 F.Supp. 994, 1008-29 (Spec. Rail Ct. 1977) (Friendly, J.)(rejecting the argument that valuation should be at scrap value when a sale at a higher price for a rail use is possible); cf. *In re Chicago, Rock Island & Pacific R.R.*, [794 F.2d 1182, 1185 (7th Cir. 1986)] (actual bids, not hypothetical calculations, are the best indicia of value).

The government's attempt to justify the findings of the Commission and the reorganization court relating to the adequacy of consideration is squarely rebutted by the precedent cited by the court of appeals.

4. This case merits this Court's review not merely because of the magnitude of the taking involved, but because it is necessary for this Court to establish the parameters of lawful governmental action with regard to property taken under special legislation. If the Seventh Circuit's ruling is permitted to stand, the government will have

escaped the consequences of its own actions. It will have license to draft and enact special legislation, have its own administrative agency resolve ambiguities in its favor, and then urge the courts to defer to agency "expertise". This is not the standard of conduct that the Fifth Amendment requires when the government chooses to take private property for public purposes. To paraphrase the government's colorful metaphor, "the trap" (Br. Opp. 24) here is laid by, not for, the United States.

For the foregoing reasons and the additional reasons stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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